Nos. 87-1303 and 87-1310

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLEGHENY PITTSBURGH COAL COMPANY.

Petitioner,

v.

COUNTY COMMISSION OF WEBSTER COUNTY, WEST VIRGINIA,

Respondent.

EAST KENTUCKY ENERGY CORPORATION, ONEIDA COAL COMPANY, INC., and SHAMROCK COAL COMPANY, INC.,

Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY, WEST VIRGINIA

Respondent.

On Writ Of Certiorari To The Supreme Court of Appeals Of West Virginia

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS

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* All parties of record in this case have consented pursuant to Supreme Court Rule 36.2 to the filing of this *amicus curiae* brief in support of the Petitioners. These consents are filed herewith.

IDENTITY OF AMICUS

The NATIONAL ASSOCIATION OF REALTORS® (hereinafter "NAR") is a not-for-profit professional association comprised of over 750,000 persons engaged in all phases of the real estate business.

NAR was created in 1908 to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property and to advance professional competence in the rendition of real estate services.

NAR includes among its members real estate brokers, managers, appraisers, counselors and a variety of other participants in the residential, commercial, industrial, farm and investment real estate markets. Through its many programs and the programs of its affiliated Institutes, Societies and Councils, NAR has been involved in and committed to the solution of every significant problem encountered by property owners for three quarters of this century. Through its long and undeviating commitment to the protection of the property owner and his rights and interests in his property, NAR has earned the right to speak not only for the real estate industry but for the American property owner.

Of the problems which have concerned NAR, few if any have been of greater importance than the preservation of the right of the individual to own real property and to exercise and enjoy the benefits of ownership as guaranteed by the Constitution of the United States of America. This commitment to the rights of the individual property owner is the foundation upon which NAR continues to grow, for without such rights there would be no development, transfer, or enjoyment of real estate.

INTEREST OF AMICUS

The NATIONAL ASSOCIATION OF REALTORS® believes that the political stability and economic prosperity of the United States of America is dependent in large measure upon the right of the individual to own real property and to exercise and enjoy the benefits of ownership. In furtherance of this belief, NAR opposes actions by governments, groups, or individuals which diminish or deny the full and free exercise of this right. The assessment and taxation practices of the State of West Virginia inhibit the free transfer of real estate and as such, constitute the type of action to which NAR is opposed.

The historical and substantial commitment of NAR to the preservation of private property rights mandates its attention to the threat presented by the West Virginia tax assessment practices to property owners and property ownership across the country.

As the nation's largest trade association within the real estate industry, NAR believes it is uniquely positioned to perceive the seriousness of this threat. Not only does NAR's membership span the entire nation, but these members are involved in upwards of 80% of real property resale transactions. This comprehensive involvement at the grassroots level of land development, investment and sale provides NAR with a direct and unobstructed view of the negative impact practices such as the one at issue here will have on the exercise of constitutionally protected property rights.

NAR does not propose herein to duplicate the legal arguments presented in Petitioners' Brief. Rather, NAR endorses and urges to this Court these arguments. Fur-

ther, to avoid unnecessary repetition, NAR adopts the statement of the case set forth in Petitioners' Brief. The purpose of NAR in submitting this brief *amicus curiae* is to voice the concern of hundreds of thousands of NAR members and the millions of American property owners they serve with the threat which the decision of the court below constitutes to the rights of the private property owner guaranteed by the Constitution.

INTRODUCTION

This case involves the fundamental constitutional right of private property ownership. NAR seeks reversal of the decision below and invalidation of the Webster County, West Virginia tax assessment system.

It is the practice of the State of West Virginia, through its duly appointed agents, to apply an *ad valorem* tax on real property by assessing the property on the basis of the value of consideration as recited in the deed of sale. This practice results in a higher tax on those properties which have been conveyed more recently than comparable properties that have not. This disparity in the tax assessments of comparable properties is due to the appreciation of property values. In assessing property in this manner, the State of West Virginia is intentionally and systematically discriminating against those taxpayers who have recently purchased property. This discrimination inhibits the free transfer of real property and thus impinges upon the constitutional right of every individual to own real property and to exercise and enjoy the benefits of ownership.

In addition to restraining the free transfer of real property, a system such as that permitted by the State of West Virginia may also result in an unnatural maneuvering of the sales price in a real property transaction as owners and purchasers try, themselves, to create some equality and adjust for the disparate taxation. As two scholarly commentators have noted:

> . . . assessment differentials may affect the market or sale price of properties as purchasers react to either the favorable or unfavorable assessments. Thus, systematic variations in assessment practices within a community may have the effect of penalizing or rewarding specific individuals, or even entire neighborhoods.

Inman and Rubinfeld, *The Judicial Pursuit of Local Fiscal Equality*, 92 Harv.L.Rev. 1662, 1702 (1979).

Currently, there are approximately 90 million households in the United States, of which two thirds own their own home. Additionally, housing transactions have combined to constitute an estimated $222 billion worth of economic activity in 1987, resulting in approximately 5% of the nation's gross national product. Clearly, these statistics show that homeownership is an integral part of our democratic society. Every American should have the opportunity to live in decent and affordable housing. This goal can only be achieved through government practices which encourage rather than inhibit the free transfer of real property.

According to a late 1986 study commissioned by NAR and conducted by Market Facts, Inc., entitled "*Homeownership: Key to the American Dream*", in the late 1970's, the rate of homeownership was on a rise. This increase peaked in 1980 at a rate of 65.6%. Since this time, the homeownership rate for the country has been

steadily declining, as evidenced by the low rate in 1986 of 63.8%. The study showed that the decline was most dramatic among individuals in the 25-34 age bracket which traditionally constitutes the largest home buying group and consists mainly of first time buyers. In this age group, the rate of homeownership dropped from 55% in 1980 to 45.7% in 1986. Notwithstanding this declining rate, the study found that homeownership still ranked at the top of Americans' list of priorities as an important ingredient to a full and satisfying life.

This drastic decline in the rate of homebuyers has been attributed, by the above study, to the sharp increase in housing prices and interest rates in the past years. This increase, coupled with a disproportionate rise in income, has resulted in large numbers of low to moderate income households and young couples finding it more difficult to accumulate the resources necessary to buy a home. Taxation practices such as that advocated by the court below which serve to discriminate against those engaged in current real property transfers, can only serve to make this problem worse.

NAR supports and advocates an equitable system of real property taxation which is based upon the fair market value of property. Equity, however, cannot be achieved where some property is taxed based upon fair market value but comparable property owned by others remains assessed at a far lower level. Fundamental principles of equality established in the Fourteenth Amendment of the United States Constitution require the reversal of the decision of the lower court and a reaffirmation of the right of an individual to own real property free from the discriminatory taxation practices condoned by the court below.

ARGUMENT

I.

THE COURT BELOW ERRED IN HOLDING THAT THE DISCRIMINATORY TAX ASSESSMENT PRACTICES DO NOT VIOLATE THE GUARANTEE OF EQUAL PROTECTION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. The Assessment And Taxation Practices Of The State Of West Virginia Are Discriminatory And In Violation Of The Equal Protection Clause.

The equal protection clause of the Fourteenth Amendment states that; "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1, cl. 4. This Court has long held that the purpose of the equal protection clause is to protect persons from intentional and arbitrary discrimination. *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441 (1923); *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350 (1918); *Raymond v. Chicago Union Traction Company*, 207 U.S. 20 (1907). Discrimination is the failure to treat equally all persons under like circumstances. This Court has spent a considerable amount of its time and effort creating well established rules regarding discrimination in taxation practices. As this Court stated in *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946); "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class."

Discrimination may occur when a taxpayer's real property is over assessed in relation to comparable property

so that he pays greater than his fair share of taxes. However, a taxpayer who is not assessed at and does not pay an excessive amount may still be the victim of discrimination through the underassessmentof his fellow taxpayers' property. *Southern Railway Co. v. Watts*, 260 U.S. 519 (1923); *Raymond v. Chicago Union Traction Company, supra.*

Although this is the exact issue the Court faces today, it is one that the Court settled long ago in the case of *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441 (1923). In *Sioux City*, the taxpayer sought to lower the valuation of its property, claiming that the State of Nebraska unconstitutionally assessed its property at 100% of its true value while all the other real estate in the county was assessed at 55%. In reviewing the situation, the Supreme Court of Nebraska did not decide whether the taxpayer had been discriminated against but rather assumed the presence of discrimination and went on to discuss the taxpayer's remedies. On appeal to this Court, Chief Justice Taft stated the Court's well established rule that "intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional rights of one taxed upon the full value of his property." *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. at 445, citing *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 352 and *Raymond v. Chicago Union Traction Company, supra.*

This rule of law was reiterated by the Court on the same day in *Southern Railway* when Justice Brandeis wrote:

> The rule is well settled that a taxpayer, although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others (citations omitted). *Southern Railway Co. v. Watts*, 260 U.S. at 526.

This principle established by the Court in *Sioux City* and *Southern Railway* has never been limited or overturned.

A necessary corollary to this rule is that taxing a property owner no more than his fair share does not cure the constitutional infirmity. The State of West Virginia applies its *ad valorem* tax to real property based on the value of consideration recited in the deed of sale. This practice necessarily results in recently conveyed properties being assessed on the basis of their current market value while other comparable properties which have not recently been conveyed are assessed at lower values.

The court below held that the State's taxation practices did not discriminate against Petitioners because the assessment of Petitioners' property was based on the true and actual value of that property. The Petitioners do not disagree that they have been taxed based upon the actual value of their property. Impermissible discrimination arises, however, when comparable property owned by others is not likewise assessed on the basis of its actual value but at a far lower level. This practice results in the undervaluation of property in the same class which has clearly been held by this Court in *Sioux City* and *Southern Railway* to be unconstitutional. Such practices must, therefore, be declared violative of the equal protection clause of the Fourteenth Amendment.

B. The Discriminatory Taxation Practice Is Systematic And Intentional.

This Court has held that unequal assessments will not be deemed to be in violation of the equal protection clause unless it can be shown that the undervaluation was intentional and systematic. *Southern Railway Co. v. Watts*, 260 U.S. at 526. This approach guards against invalidating

unequal assessments resulting from genuine errors of judgment or mistaken information. In order to support a claim of discrimination, it is not enough for a taxpayer to show that a mere error in judgment occurred. He must show an intentional violation of the essential principle of practical uniformity. *Sioux City Bridge Co. v. Dakota County, Neb., supra.*

Additionally, the undervaluation does not have to be applied maliciously but can be unconstitutional even where the system is thought to be valid. In *Cumberland Coal Co. v. Board*, 284 U.S. 23, 24 (1931), this Court reinforced this view when it stated:

> There is no question that the assessments under review were made pursuant to a deliberately adopted system. The case is not one of mere errors in judgment in following a proper method (citations omitted), but one where the challenged discrimination resulted from a plan of assessment which was not the less systematic and intentional because of belief in its validity. (citations omitted).

The practice of the State of West Virginia in applying its *ad valorem* tax to real property is to assess the tax on the actual value of the property based on the value of consideration recited in the deed of sale. This method is systematically and intentionally followed and results in recently conveyed properties being taxed at higher values than those comparable properties which have not recently been sold. No error in judgment or a sporadic deviation causes this method to be undertaken, but rather, the assessments are consistently rendered in this fashion. What is sporadic is the way the tax assessor tries to alleviate the discrepancy in values by applying occasional *de minimis* adjustments to the value of comparable properties which are not conveyed. These random increases

in value demonstrates that West Virginia is aware of the disparities caused by its system of taxation. Since the West Virginia taxation practices are consistently applied and consistently result in disparate values being placed on comparable properties, this Court should declare that the taxation system in West Virginia violates the equal protection clause of the Fourteenth Amendment.

II.

THE COURT BELOW ERRED IN HOLDING THAT THE SOLE REMEDY AVAILABLE TO THE TAXPAYERS WAS TO SEEK TO RAISE THE ASSESSMENT OF ALL OTHER COMPARABLE PROPERTIES IN THE COUNTY.

The court below held that any taxpayer who contests the assessment of his property as excessive when it is based on market value will not be allowed a reduction in his assessment but must seek to raise the assessments of those taxpayers who own comparable properties. The lower court has advocated this remedy on more than one occasion as evidenced by the holding in *Killen v. Logan County Commission*, ____ W.Va. ____, 295 S.E.2d 689, 709 (1982) which states:

> In the future, taxpayers who claim that they are being overassessed in relation to other taxpayers may not have their assessments reduced as long as their property is valued at market value. Instead, they should seek to have the assessments of other taxpayers raised to market value.

By placing the burden of seeking the remedy on the taxpayer, the decision of the lower court contravenes the precedent set by this Court in *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931) and *Hillsborough v. Cromwell*, 326 U.S. 620 (1946). In *Iowa-Des Moines*, this Court reiterated the well settled rule that a taxpayer who has been discriminated against should not have to

carry the burden of attempting to raise the taxes of his fellow taxpayer. This Court also held that the taxpayer did not have to wait for state officials to seek the increase of others' taxes but rather the taxpayer was allowed an immediate reduction in his own taxes of the excess. *Iowa-Des Moines*, 284 U.S. at 247.

This principle was again applied by this Court in *Hillsborough v. Cromwell*, *supra*. In this case, the taxpayer brought suit in federal court in New Jersey to have certain tax assessments declared invalid under the due process and equal protection clauses of the Fourteenth Amendment. It was noted, in the opinion of this Court, that the courts of New Jersey had long supported the remedy advocated by the lower court here today; that an aggrieved taxpayer's only recourse is to proceed against other members of his class in order to increase their taxes. This Court rejected the precedent set in New Jersey as being contrary to the established rule when it stated:

> The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. (citations omitted). *Hillsborough*, 326 U.S. at 623.

Moreover, this Court emphasized the weight of its decision by stating that in light of the examples set in the New Jersey courts "it is plain that the state remedy is not adequate to protect respondent's rights under the federal Constitution." *Hillsborough*, 326 U.S. at 624.

It is against these established principles that the Respondent would have this Court rule today. This Court ought not abandon its decisions in *Hillsborough* and *Iowa-Des Moines* by allowing the remedy advocated by the

lower court. The Petitioners must be permitted the benefit of the remedy set by this Court in *Iowa-Des Moines*; a reduction in their taxes of the excess. It has long been held by this Court that a reduction in taxes will be permitted for equity's sake even where this action goes against state statute. This was evidenced by the Court in *Cumberland Coal Co. v. Board*, 284 U.S. at 29, when it cited its longstanding decision in *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. at 446:

> This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.

By sustaining the decision of the lower court, this Court will be overturning precedent set at least fifty years ago. It will also be advocating the unequal and unjust discriminatory tax practice whereby taxpayers who have recently purchased property will be taxed at much higher values than those real property owners who have held on to their property. This Court will, by its decision today, decide whether real property can be freely sold and transferred or unjustly burdened by discriminatory tax assessment practices. Although NAR supports a system of taxation based upon the fair market value of property, NAR urges this Court to mandate equal treatment, whether by increasing the values of comparable properties in West Virginia or decreasing Petitioners' assessments. The equality mandated by the Fourteenth Amendment must be achieved to preserve the right and freedom to enjoy real property ownership.

CONCLUSION

For the foregoing reasons, the NATIONAL ASSOCIATION OF REALTORS®, as *amicus curiae*, submits that this Court should rule that the real property tax assessment practices of West Virginia are unconstitutional and that the decision of the West Virginia Supreme Court of Appeals be reversed.

Respectfully submitted,

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